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MICHAEL RODAK, JR., CLE

In The

Supreme Court of the United States

October Term, 1972

No. 72-1174

CARMINE SAGLIMBENE,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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II. The original Petition for Certiorari (October Term, 1971, No. A. 542) filed December, 1971, raised, in addition to the speedy trial claim, four other reasons for granting the Writ. Petitioner respectfully re-asserts those issues by reference, as if fully incorporated herein, to the extent that they were not previously passed upon by this Court when Certiorari was granted and a Remand ordered on the speedy trial claim. . . 21

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In The

Supreme Court of the United States

October Term, 1972

No.

CARMINE SAGLIMBENE,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 26, 1972.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit, not yet reported, appears in the appendix to this brief.

Jurisdiction

The judgment of the Court of Appeals affirming, upon remand from this Court, the petitioner's conviction in the United States District Court for the Southern District of New York was entered on December 26, 1972. The time for filing of this petition was extended until February 24, 1973, by order of Justice Marshall entered January 19, 1973; see Docket No. A574.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). The jurisdiction of the District Court was based on 18 U.S.C. Sec. 3231.

Constitutional and Statutory Provisions Involved

1. The Fifth and Sixth Amendments to the United States Constitution.

2. 21 U.S.C. Secs. 173, 174.

Questions Presented

1. Was the petitioner denied his Sixth Amendment rights where the Government delayed his one-day trial for six years solely in order to obtain a trial advantage?

2. Was it proper to invoke the statutory presumption of knowledge of illegal importation of narcotics where there was no evidence of the petitioner's actual or constructive possession of the drugs?

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3. Was guilt of conspiracy shown beyond a reasonable doubt where there was no proof that the petitioner had a stake in the venture or did anything other than participate in a conversation with a co-defendant?

4. Was the petitioner denied a fair trial where the prosecutor's summation referred to facts not in evidence and encouraged the jury to infer guilt from the weakness of the Government's case?

5. Was the jury improperly allowed to consider hearsay declarations of a co-conspirator to determine whether there was a conspiracy and whether the petitioner joined it?

6. Was the petitioner denied a fair trial where the court in its charge allowed the jury to consider overt acts unsupported by proof and referred to a count dismissed at the end of the Government's case, and by the failure of the court to define the term "facilitation" in its charge to the jury?

Statement of the Case

Indictment 65 Cr. 245, filed March 22, 1965, charged the petitioner Carmine Saglimbene, along with a co-defendant Patsy Joseph Piparo, with conspiracy and substantive counts in violation of 21 U.S.C. §§173 and 174 (6a-12a).[1] On May 24, 1971 the petitioner was convicted in the United

1. References with the designation "a" refer to the appendix filed on the original appeal. References with the designation "sa" refer to the supplemental appendix filed on this appeal.

(Cont'd)

States District Court for the Southern District of New York (MacMahon, D.J. and a jury) for conspiracy (21 U.S.C. §174) and one substantive count involving the sale of approximately one ounce of heroin (21 U.S.C. §§173, 174). He was sentenced on each count to ten years' imprisonment, the sentences to run concurrently, and a total committed fine of $40,000. The petitioner was remanded upon sentencing and is presently serving his sentence.

On October 6, 1971, the United States Court of Appeals for the Second Circuit affirmed the judgment of conviction without opinion.

On June 26, 1972, the United States Supreme Court granted a petition for a writ of certiorari, vacated the judgment and remanded the case to this Court for further consideration in the light of Barker v. Wingo, 407 U.S. 514 (1972). Saglimbene v. United States, 92 S. Ct. 2488 (1972).

On December 26, 1972, the Court of Appeals, upon the remand, affirmed the judgment in an opinion (Appendix A).

Statement of Facts

A. The Trial Delay.

The petitioner Saglimbene and co-defendant

(Cont'd)

The supplemental appendix, and Appendix B herein, contain a reproduction of the District Court docket sheet. The docket entries in the original appendix (1a-5a) are incomplete, and in one case inaccurate.

Piparo were indicted on March 22, 1965. Saglimbene was arraigned on April 29, 1965, and released on bail the same day. In the next few months, petitioner made a motion for a bill of particulars, and the government filed the bill on July 22, 1965. The docket sheet, remained silent as to Saglimbene until November 14, 1966, when a motion to suppress and inspect the grand jury minutes was made. One month later, the docket sheet entry notes an order by Judge Croake that "this case having been returned to the Criminal Calendar" the motion is referred to the judge presiding at the call of the criminal calendar. Five months later, on April 6, 1967, the Government was prepared to try the co-defendant Piparo on the substantive count. Accordingly, the Government moved to sever count 1 (the conspiracy count) as to both defendants, and then to sever the case as to the petitioner Saglimbene. Both motions were granted. The next day, however, when the case was called for trial, Piparo was not present. A bench warrant then issued for the fugitive co-defendant. The next entry on the docket sheet came 3 1/2 years later, on November 19, 1970. This recorded that the case as to both defendants was "closed statistically" because Piparo was a fugitive.[2]

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2. A copy of the docket sheet is annexed to this petition as Appendix B. The docket entry has a check mark next to both the defendant and the co-defendant in listing who was a fugitive. But while Piparo had indeed fled, Saglimbene was not a fugitive and any listing of the petitioner in that category was clearly a mistake. The petitioner was always available for trial and his whereabouts known to his bondsman (17a). The government has never claimed that the petitioner was ever a fugitive and it is not an issue on this application.

Apparently, the promulgation of the Second Circuit's rules on speedy trials, announced for implementation in the near future, triggered a review of old cases, and the petitioner's case was put on the trial calendar. On March 29, 1971, the trial date, the government was still not ready to proceed, claiming that a witness was missing (14a-15a). The defendant Saglimbene moved to dismiss the indictment on speedy trial grounds, a motion originally made three weeks earlier on March 9, 1971 (15a, 5sa). In response to the motion to dismiss for failure to afford a speedy trial, the government attorney explained that "the case has been in the posture of awaiting the arrest of Piparo" (25a).[3] The government was then granted 30 additional days to try the case, and on April 26, 1971, the trial began. The case took one day to try, and on the same day the jury returned a verdict of guilty.

Throughout the six years, from March, 1965 until April, 1971, the defendant never made any motions for adjournments or continuances.

B. The Trial

The instant case is remarkable on its facts insofar as the petitioner was convicted despite

3. The government suggested on the motion to dismiss in the District Court that it wanted to try Piparo and Saglimbene together on the conspiracy count (25a). On the original appeal, the government brief stated that it wanted to try Piparo first on the substantive count and then, hopefully, use Piparo as a witness against Saglimbene at a later trial (Govt's. orig. brief, p. 10).

the fact that he had no dealings with any witness for the government and was never found in physical possession of the heroin which became the subject matter of the charges. Petitioner's alleged complicity, if any, was wholly circumstantial.

In essence, it was the government's theory that Saglimbene had a telephone conversation with a co-defendant, Piparo, in furtherance of the drug sale. Both Piparo and the petitioner had been seen speaking into different telephones at widely separated locations at about the same time. It was, accordingly, surmised that they had been conferring with one another. Piparo's side of the conversation had been overheard by an undercover agent, but there was no proof of the identity of the person to whom he had been talking. Other evidence tended to show that Saglimbene and Piparo had been together momentarily about an hour prior to the telephone call, and came together again approximately 80 minutes following their supposed telephone conversation. Briefly stated, the trial proof showed the following:

On January 8, 1965 Special Agent Selvaggi arrived at the Garden of Roses bar at 172nd Street in the Bronx at about 5 P.M. He observed the petitioner Saglimbene talking to Patsy Piparo (59a-60a). At 5:20 Piparo made a phone call, and five minutes later he left the bar (60a).

At about 6 P.M., Special Agent Peterson went to a candy store at 146th Street in Manhattan where he was introduced to Piparo by Lokey Allen. Peterson and Piparo discussed the purchase of heroin, Piparo quoting a price of $500

per ounce. Peterson replied that he was interested in a large amount of good quality and would purchase one ounce to test its quality (40a-42a). At "approximately 6:10 P.M." Piparo made a telephone call, and upon its completion Peterson gave Lokey Allen $500, Allen immediately handing the money to Piparo. Piparo then left the store, saying he would return in half an hour (43a).

Meanwhile, at "approximately 6:10 P.M.", Agent Selvaggi in the Garden of Roses bar saw Saglimbene answer a ringing phone in the bar's telephone booth and then return to his table. The petitioner was approached by a man, never identified (71a, 73a), who asked "What's the story?" Saglimbene allegedly "just raised his index finger" (60a).

When Piparo drove away from the Manhattan candy store he was followed by two other agents. However, they "lost him" when he turned off the Cross-Bronx Expressway (56a, 76a-77a).

At 6:25 the agent in the Garden of Roses bar saw Piparo enter and talk to Saglimbene for five minutes. Piparo then left (62a).

At 6:45 Agent Selvaggi followed the unidentified man who had talked to the petitioner. He trailed the man to Westchester and then was told to return to the bar (62a).

A half-hour after Piparo left Agent Peterson and Lokey Allen in the candy store, he returned and gave Allen a glassine envelope, later found to contain 21.3% heroin (91a). Allen gave the drug to Peterson who told Piparo he would test

it. If it was satisfactory, Peterson commented, Piparo would have a regular customer. Piparo replied that that was what "he was looking for" (43a-44a).

When Piparo left he was trailed to the Garden of Roses bar (78a) where Selvaggi saw him talking to Saglimbene at 7:30 (62a).

Peterson bought heroin from Piparo on three unspecified occasions after January 8. On one of these occasions Peterson mentioned that he was interested in purchasing large quantities, and Piparo told the agent that "he would have to check with his people prior to doing anything of a large quantity." Piparo also gave Peterson a card with the address of the Garden of Roses bar and said that he could be reached there (47a-50a).

Saglimbene was arrested 8-10 days after Piparo was taken into custody (79a-80a). An agent had left his name and phone number at the appellant's home, and Saglimbene had telephoned and met with the agent. At the meeting, the agent suggested that Saglimbene "cooperate" by "developing information concerning other people." When the petitioner replied that "he was not in a position to help" he was arrested (79a-84a).

Reasons for Granting the Writ

I. PETITIONER'S SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WAS DENIED BY THE SIX-YEAR DELAY CAUSED SOLELY BY THE GOVERNMENT'S DESIRE TO OBTAIN A TRIAL ADVANTAGE.

Introduction.

The crime charged in the indictment took place in January 1965. The indictment itself was filed on March 22, 1965. The trial began and ended on April 26, 1971, more than six years after the grand jury accused the appellant. This inordinately long delay of a one-day trial was not, however, caused by the petitioner. Instead, the government insisted on trying the co-defendant Piparo first, thereby hoping to enlist a convicted co-defendant to buttress the case against Saglimbene. But, though Piparo had fled and thus could not be tried first, the Government's strategy remained unchanged, and the petitioner's case was seemingly forgotten and then marked statistically closed (4sa; Appendix B). The case was finally moved for trial after the new Second Circuit speedy trial rules were announced for implementation in the near future (17a). However, by this time the delay was sufficiently long to deny Saglimbene his Sixth Amendment rights, the government's attempt to obtain a trial advantage over him providing him a totally inadequate reason for procrastinating so long.

Barker v. Wingo, 407 U.S. 514 (1972) authoritatively fashioned the standards to be applied

in assessing speedy trial claims. In Barker the trial of the petitioner was delayed for more than five years while the state sought to convict a co-defendant first, intending then to use the co-defendant's testimony against the petitioner. A series of appellate reversals and hung juries prevented speedy determination of the co-defendant's guilt. During this time, however, Barker's case was regularly called almost every month and the adjournments sought by the prosecution were not objected to by Barker. Finally, after the accomplice was convicted, and the petitioner's trial was imminent, Barker moved to dismiss the indictment. His motion was denied and Barker was convicted.

At the outset, this Court rejected two approaches to the problem of delayed trials. First, the Court declined to adopt any specific time limit within which a defendant is to be offered a trial. While other courts may adopt such rules, such as the rules of the Second Circuit requiring a trial to begin within six months, the Supreme Court felt that the Constitution did not require it. Second, the Supreme Court disapproved the demand-waiver rule, which inferred a waiver of the speedy trial right unless the defendant demanded a speedy trial. Presuming waiver from inaction was held to be inconsistent with constitutional standards regarding fundamental rights. Instead, the Court adopted a balancing test in which four factors were to be weighed together; the length of delay, the reason for the delay, prejudice to the defendant, and the defendant's assertion of the right to a speedy trial. The Court concluded that these factors "have no talismanic

qualities; courts must still engage in a difficult and sensitive balancing process. But because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution" (92 S. Ct. at 2193).

Applying the standards to the Barker case itself, the Supreme Court found that the delay of more than five years was too long, and the attempt to convict the co-defendant for four years was an insufficient excuse for such an "extraordinary" delay. While the defendant suffered little actual prejudice, although some may be presumed because of the long time involved, the decisive factor in denying Barker's claim was the fact that Barker did not really want a speedy trial. Specifically, the record was clear that Barker never objected to any of the numerous continuances sought while his accomplice's case was being prosecuted, though Barker regularly had the opportunity to voice objections when the case was on the calendar. Significantly, these critical factors are not present in the instant case. While, as in Barker, the delay was too long, and the excuse inadequate, there is in contrast no evidence that Saglimbene did not want a speedy trial. His case was not calendared regularly for adjournments, nor did Saglimbene ever acceed to prosecution requests for postponements. Rather the case was relegated to a peculiar limbo where it did not appear on the calendar for over three years, and then it was marked statistically closed. The first time it reappeared, however, counsel immediately moved to dismiss on speedy trial grounds. Moreover,

since the proof against the petitioner was marginal, it was to his advantage to be tried before his co-defendant Piparo. In substance, then, while in Barker the prosecution continuously expressed an interest in trying the case, here the government simply considered it dead.

The Four Factors.

Preliminarily, it is quite clear that six years is simply too long to fit the requirement of a speedy trial. Indeed, the new Second Circuit rules envision a speedy trial as one which commenced within six months of indictment. Aside from the new rules, shorter time periods have been held too long to satisfy the Sixth Amendment. In United States v. Lustman, 258 F.2d 475 (2nd Cir. 1958), it was held that four years was "an undue delay" (id. at 477), and the same four year interval was held violative in United States v. Richardson, 291 F. Supp. 441 (S. D. N.Y. 1968). Four years was also viewed as an unreasonable delay in New York in People v. Minicone, 28 N.Y. 2d 279 (1971), and indeed, New York has even found an unexplained interval between indictment and trial of two years to be "prima facie unreasonable" [People v. Bryant, 12 N.Y. 2d 719, 720 (1962)]. In Barker, the Supreme Court termed a five-year delay as "extraordinary" (92 S. Ct. at 2194). And most recently, in one of the first cases to apply Barker, the Seventh Circuit held a ten month delay inordinate "in light of the simple nature of the case" [United States v. Strunk, 467 F.2d 969, (7th Cir. 1972)]. Here, a delay of six years in the prosecution of a case which took

one day to try is obviously too long.[4] Indeed, the Second Circuit held that the delay here was sufficiently long to trigger consideration of the other speedy trial factors (Appendix A).

The explanation for the delay put forward by the government, moreover, is wholly inadequate to justify the six-year wait. Indeed, it highlights the fact that the petitioner was not responsible for it, the blame falling on the government's desire to obtain a trial advantage over Saglimbene. For knowing that the case against Saglimbene was extremely weak, while the proof against the alleged co-conspirator Piparo was commensurately strong, the government quite naturally felt that "if Piparo were to testify against Saglimbene, the government would have an overwhelming case against him as well" and that "a convicted Piparo facing sentence might well be persuaded to testify against Saglimbene" (Gov't. orig. Ct. of App. brief, p. 10). Consequently, the prosecution severed the substantive counts, intending first to try Piparo separately.[5] Piparo, however, punctured

4. This Court, in Barker, took specific notice that a case requiring little time to prepare and try, or a case lacking in complexity, presumably should be tried without delay. The instant case was completed within one day.

5. The government offered another reason for the severance which was also pointed out in the opinion of the Court of Appeals below. Specifically, it was claimed that wiretap evidence, inadmissible as to Piparo, but admissible as to the petitioner, necessitated separate trials (Gov'ts orig. brief, p. 10; opinion below, Appendix A). Yet, whatever the tenor of this proof, it certainly had no continuing influence on the reasons for delaying the trial of the petitioner. For no wiretap evidence was ever introduced or even offered at Saglimbene's trial.

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the prosecution's plans by fleeing, and on April 7, 1967, a bench warrant was issued for Piparo (3a). For four years the case lay totally dormant. It sprung to life in 1971 after the new Second Circuit speedy trial rules were promulgated, thus sparking a review of dead cases.

Certainly, a defendant who is responsible for delay cannot sustain a speedy trial claim. Thus, if he is a fugitive, or makes dilatory pleadings or motions or consents to government adjournments or is incompetent to stand trial he cannot avail himself of the delay he causes [e.g. Dickey v. Florida, 398 U.S. 30, 48 (1970); United States v. Davis, 365 F.2d 251, 255 (6th Cir. 1966)]. However, in the present case the petitioner was always available for trial, and did not procrastinate or retard it. While some reasonable time may be alloted to look for a fugitive co-defendant (see, Second Circuit Rules Regarding Prompt Disposition of Criminal Cases), four years is obviously too much. The government, long before 1971, should have been aware of the increasingly slim possibility of finding Piparo, and should have forthrightly proceeded to trial. Indeed, had Saglimbene fled and Piparo stayed, there would be no question that the prosecution would have pressed expeditiously for trial. The fact that the government sought a trial advantage by convicting Piparo first is not an adequate excuse for delaying the petitioner's trial. The present case, completed within the space of one day, could have easily been disposed of much earlier. It is evident, however, that the prosecutors realized the weakness of the case and were probably hoping that it would go away or Piparo would come back.

Under such circumstances petitioner's Sixth Amendment right to a speedy trial was denied. Indeed, a similar excuse in Barker was unavailing. There the government also sought to convict a co-defendant first, so as to use the accomplice at the later trial of Barker. But hung juries and reversed convictions prevented implementation of the prosecution strategy. Four years of trying was considered "too long a period" to provide an adequate excuse for the delay (92 S. Ct. at 2194).

A third factor, prejudice, is present here generally, if not specifically. That is, there is no claim that any defense witness or proof was lost, nor was the defendant incarcerated during the delay. The prejudice that did occur is the adverse effect, recognized in Barker, of being under suspicion and indictment for six years, with its attendant anxiety uncertainties.[6]

Though the demand-waiver rule was rejected in Barker, the defendant's assertion of his speedy trial right is still a factor to be considered. Indeed, in Barker, the defendant's posture in acquiescing to adjournments weighed strongly against his claim. In the present case, however, the situation is quite different, for the petitioner's actions under the circumstances were not inconsistent with the advancement of a valid speedy trial claim.

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6. Nor should it be overlooked that there was imposed upon petitioner the rule of the District Court confining him to the geographical limits of the Southern District of New York.

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Barker v. Wingo distinguished.

This Court denied Barker relief because the record made it clear that "Barker did not want a speedy trial" (92 S. Ct. at 2194). Specifically, Barker acquiesced in the delay by failing to object to the constant continuances sought by the prosecution; for instance, he made no objection to the first 11 adjournments (92 S. Ct. at 2185). In so holding, however, the Court made it clear that there may be circumstances where the failure to object to continuances will not undercut a speedy trial claim.

> "We do not hold that there may never be a situation in which an indictment may be dismissed on speedy-trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted ex parte. But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial." (Id. at 2195, emphasis supplied.)

The present case clearly involves one of the "extraordinary circumstances" mentioned in the Barker opinion. For the case was simply off the calendar for over three years. Not even regular ex parte continuances were necessary, where, at least, a judge could receive progress reports

on the search, if there was one, for Piparo. Instead, the prosecution shuttled the case from one assistant to another (19a), and had apparently given up any hope of finding Piparo and trying Saglimbene. With no confidence in the possibility of convicting Saglimbene alone, the prosecution closed the case statistically. In this situation, Saglimbene did not have the opportunity either to object to the long adjournment or acquiesce in it. And the petitioner cannot be held to have failed to assert his speedy trial rights, when he was never notified to be in court where he could assert it or disclaim it. Obviously, then, if ex parte prosecution adjournments take the case out of the Barker facts, as the Supreme Court noted, then certainly the government's act of withdrawing the case from the calendar for over three years amply distinguishes Saglimbene's situation from the Barker facts. Indeed, the concurrence in Barker significantly points out that it was "fortunate" for the state that "postponements took place only upon formal requests to which Barker had opportunity to object." For "had Barker not so clearly acquiesced in the major delays involved in this case, the result would have been otherwise." (92 S. Ct. at 2195). Here, Saglimbene never acquiesced, agreed or consented to any postponement. There were no formal government requests for adjournment to which the defendant could address himself. But the first chance he had, when the case was returned to the trial calendar, the defendant moved to dismiss on speedy trial grounds. Consequently, unlike Barker, there is no evidence here that the defendant did not

want a speedy trial.[7]

Indeed, it is more than possible that Saglimbene was interested in obtaining a speedy trial under the circumstances. The case against him was extremely weak, and it would not be to his advantage to have Piparo convicted and then used to bolster the case against him. Preferably, he would want to be tried before Piparo. Thus, if he was aware that the prosecution was still interested in trying him, the petitioner would undoubtedly have wanted the trial to occur as early as possible. But when the prosecution endlessly left the case off the calendar, the petitioner undoubtedly caught the message that the government had no present intention of ever bringing him to trial. Thus, unlike Barker, the case was not put off to allow the government to actively prosecute the co-defendant. Rather the co-defendant's case was also closed statistically, and the government was not doing anything to change that state of affairs.

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7. Strangely, the Court of Appeals' opinion fails even to notice that the case was put off the calendar ex parte and marked statistically closed for more than three years. Rather, affirmance rests on the view that "Saglimbene was content to wait and hope that Piparo was never caught" and that "the defendant did not ask for a speedy trial" (Opinion below, Appendix A). But such a holding is at odds with this Court's assessment of the speedy trial right in Barker. In rejecting the demand rule, the Supreme Court made it plain that "A defendant has no duty to bring himself to trial" (92 S.Ct. at 2190, supra). Here, the government simply failed in its duty to provide a speedy trial, and left the case off the calendar. That the defendant did not "bring himself to trial" does not, in contrast to the opinion of the Court of Appeals, foreclose his speedy trial rights.

Thus, where the delay was too long, the excuse for it unsatisfactory, and where there is no indication that the defendant did not want a speedy trial, the speedy trial right was lost, entitling the defendant to a dismissal of the indictment and vacation of the sentence (see Uviller, Barker v. Wingo, Speedy Trial Gets a Fast Shuffle, 72 Columbia L. Rev. 1376).

Alternative Relief.

Recently, the Seventh Circuit, in one of the first post-Barker cases, developed an alternative remedy for speedy trial denials in United States v. Strunk, 467 F.2d 969 (7th Cir. 1972, cert. granted, ____U.S._____, 1973; 12 Cr.L. Rptr. 4149. That is, the period of time in which the delay violated the constitutional rights of the defendant could be subtracted from the sentence finally imposed. Thus, in Strunk, the circuit court chose to regard the sentence imposed as illegal to the extent of the unreasonable delay, and remanded the case to the District Court with instructions to credit the defendant with the period of time which had elapsed against the sentence he was serving. Petitioner thus urges alternatively that the six years between indictment and trial, during which period the defendant was denied a speedy trial in violation of his constitutional rights, be credited against the sentence imposed.

II. THE ORIGINAL PETITION FOR CERTIORARI (OCTOBER TERM, 1971, NO. A.542) FILED DECEMBER, 1971, RAISED, IN ADDITION TO THE SPEEDY TRIAL CLAIM, FOUR OTHER REASONS FOR GRANTING THE WRIT. PETITIONER RESPECTFULLY REASSERTS THOSE ISSUES BY REFERENCE, AS IF FULLY INCORPORATED HEREIN, TO THE EXTENT THAT THEY WERE NOT PREVIOUSLY PASSED UPON BY THIS COURT WHEN CERTIORARI WAS GRANTED AND A REMAND ORDERED ON THE SPEEDY TRIAL CLAIM.

Conclusion

The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Decision

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 162—September Term, 1972.

(Submitted November 13, 1972

Decided December 26, 1972.)

Docket No. 71-1652

UNITED STATES OF AMERICA,

Appellee,

v.

CARMINE SAGLIMBENE,

Appellant.

Before:

MOORE, HAYS and FEINBERG, *C.JJ.*

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York before Lloyd F. MacMahon, *Judge,* and a jury; remanded by the Supreme Court of the United States with instructions to consider whether the defendant's right to a speedy trial was violated under the standards set out in *Barker* v. *Wingo,* 407 U.S. 514 (1972).

Affirmed.

LAWRENCE K. FEITELL, New York, New York, *for Appellant.*

LAWRENCE S. FELD, New York, New York (Robert P. Walton, Assistant United States At-

torney, Whitney North Seymour, United States Attorney, on the brief), *for Appellee.*

HAYS, *Circuit Judge:*

Carmine Saglimbene was convicted on April 26, 1971, in the United States District Court for the Southern District of New York after a one day trial before Judge Lloyd F. MacMahon and a jury, for conspiracy to violate the federal narcotics laws and for one substantive violation of the narcotics laws. 21 U.S.C. §§173-4. This court affirmed the conviction of Saglimbene from the bench without opinion. On June 26, 1972, the United States Supreme Court granted the defendant's petition for certiorari, vacated the judgment, and remanded the case to this court for further consideration of the issue of defendant's right to a speedy trial in light of *Barker* v. *Wingo*, 407 U.S. 514 (1972).

An indictment was filed against Saglimbene and co-defendant Piparo on March 22, 1965. Saglimbene entered a plea of not guilty on April 29, the day after his arrest on a bench warrant. He was released on bail the same day. The case then followed a normal course and in December, 1966 it was sent to a trial judge but was returned because the judge was unable to reach it.

In April, 1967, the trial court granted a motion of co-defendant Piparo to suppress certain wiretap evidence. The court also granted the government's motion to sever the conspiracy count as to both defendants and to sever Saglimbene's trial from the trial of Piparo on the substantive counts. Then on April 7, 1967, Piparo failed to appear for trial and a bench warrant was issued for his arrest. Piparo has remained a fugitive ever since.

From April, 1967 until January, 1971 the government did not press the prosecution of Saglimbene and the defen-

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dant made no effort to speed his trial. On January 11, 1971 the trial judge ordered the case against Saglimbene to be brought to trial. Saglimbene did not appear for trial and a bench warrant was issued for his arrest. Saglimbene surrendered to the authorities two months later, and for the first time requested a speedy trial. The motion was granted and trial was set for March 28, 1971. However, on March 29th, the government requested a continuance because it could not locate an essential witness. The witness was found, and on April 26, 1971 the trial was finally held and Saglimbene was convicted.

I.

In determining whether the defendant's right to a speedy trial has been violated under the test set out by the Supreme Court in *Barker* v. *Wingo*, supra, we must consider four factors: length of delay, the reason for delay, the defendant's assertion of the right, and the prejudice to the defendant. In weighing these factors in the instant case, we think it clear that the defendant's right to a speedy trial has not been violated.

As the Supreme Court noted, length of delay acts as a triggering mechanism. Until there is some unusual delay there is no necessity for inquiry into the other factors that go into the balance. *Barker* v. *Wingo*, supra at 530. In the instant case six years elapsed between the date of the indictment and the trial. Even if we accept the government's claim that it is not responsible for the first two years of delay, four years remain, a sufficient period to warrant consideration of the other factors in the test set out in *Barker*.

The reason for delay in the instant case is clear. After the trial court granted the motion to suppress certain wiretap evidence, the government moved to sever the defen-

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dants and try Piparo separately, thus avoiding any problem as to the wiretap evidence which was admissible against Saglimbene but inadmissible against Piparo, and opening the possibility that Piparo, against whom the government believed it had an overwhelming case, if he were convicted, might be persuaded to testify against Saglimbene. Piparo then fled. This presented Saglimbene with an attractive course of action. He believed that as long as Piparo was at large the government would not press for his (Saglimbene's) trial. Thus Saglimbene was content to wait and hope that Piparo was never caught.

The reason for delay is closely tied to the third factor which we must consider—defendant's assertion of his right to a speedy trial. In the instant case, acting in his self interest, the defendant did not ask for a speedy trial until March, 1971. The defendant's failure to assert the right is an important factor in the balancing process, as the Supreme Court said:

> "We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker* v. *Wingo,* supra at 532.

Finally, defendant suffered no special prejudice from the delay in trial. He conceded that the only prejudice he suffered was the adverse psychological effect of being under indictment. This is of course present in every case.

Weighing the four factors enunciated by the Supreme Court in *Barker,* we find that the defendant's right to a speedy trial was not violated by the six year delay. While the delay was substantial, it was not without substantial justification, and the defendant, acting in his self interest, did not assert his right for five years and suffered no specific prejudice.

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II.

Saglimbene, relying on *United States* v. *Strunk*, —— F.2d —— (7th Cir. 1972), argues that he is entitled to have his sentence reduced by six years, the period between indictment and trial. This contention is without merit. For relief to be available under the *Strunk* rationale, there must first be a violation of a constitutional right. There is no such violation in the instant case.

Affirmed.

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APPENDIX B

Docket Entries

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

65 Cr. 245

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THE UNITED STATES,

v.

PATSY JOSEPH PIPARO-All Cts.

CARMINE SAGLIMBENE-All Cts.

- - - - - - - - - - - -

T. 21, Secs. 173 & 174, U.S. Code.

Unlawfully conspiring to violate the narcotics laws of the U.S., i.e., Secs. 173 & 174, T. 21, U.S. Code (Ct. 1)

Unlawful sales of heroin. (Cts. 2, 3, 4 & 5)

(TOTAL - FIVE COUNTS)

Statistical Record

J.S. 2 mailed /

J.S. 3 mailed (1 & 2) 2 /

Docket Entries

Date	Proceedings
3-22-65	Filed Indictment.
3-23-65	CARMINE SAGLIMBENE - Warrant of Arrest Ordered. COOPER, J.
3-23-65	CARMINE SAGLIMBENE - Bench warrant issued.
3-29-65	PATSY JOSEPH PIPARO - Filed Notice of Appearance by Horacio L. Quinones, Esq., of 1706 Lexington Ave., NYC.
3-31-65	PATSY JOSEPH PIPARO - (atty present). PLEADS NOT GUILTY. Deft. remanded in lieu of bail fixed in the sum of $25,000. COOPER, J.
4-28-65	CARMINE SAGLIMBENE - Deft. brought to Court on bench warrant. Bail fixed in the sum of $10,000. (no atty present) Adjourned to 4-29-65 for pleading. Deft. Remanded. PALMIERI, J.
4-29-65	CARMINE SAGLIMBENE - (atty present) Pleads NOT GUILTY. Deft. remanded in lieu of bail reduced to the sum of $6,500. PALMIERI, J.
4-29-65	PATSY JOSEPH PIPARO - (atty pres.) - Deft. remanded in lieu of bail reduced to $20,000. PALMIERI, J.

Docket Entries

4-29-65	CARMINE SAGLIMBENE - Filed notice of appearance by Horacio L. Quinones of 1706 Lexington Ave. N.Y. C.
5-5-65	CARMINE SAGLIMBENE - Filed warrant for arrest of deft. dtd 3-23-65 & entered return - Executed on 4-28-65.
5-7-65	CARMINE SAGLIMBENE - Filed Notice of Substitution by Ostrow & Carro, Esqs., (Patrick M. Wall, Esq., of counsel), 150 Broadway, New York, N.Y., 10038, as attorneys for the def't. "So Ordered: 5/7/65 - James E. Valeche, Clerk"
5-11-65	PATSY JOSEPH PIPARO - Docketed-Filed remand dated 3/31/65
5-12-65	CARMINE SAGLIMBENE - Filed remand dated 4-28-65
5-12-65	CARMINE SAGLIMBENE - Filed remand dated 4-29-65 - Memo Endorsed: "Deft. Released on bail." John Garrity, U.S. Commissioner, S.D.N.Y. 4-29-65.
5-12-65	CARMINE SAGLIMBENE - Filed Warrant of Arrest of Deft. (& copy) dated 3-23-65 and entered Marshal's return. - Arrested 4-28-65 by Narcotic Agent. Warrant not used. Anthony R. Marasco, Marshal, SDNY

Docket Entries

5-25-65	CARMINE SAGLIBENE - Filed affdvt & notice of motion for Bill of Particulars.
5-28-65	PATSY JOSEPH PIPARO - Filed affidavit & notice of motion for bill of particulars.
6-2-65	PATSY PIPARO - Filed Affidavit and Order to Show Cause to fix bail in the sum of $5,000. CROAKE, D.J.
6-3-65	PATSY PIPARO - Before Croake, J. Order to Show Cause to fix bail - Motion argued - Decision reserved.
6-7-65	PATSY PIPARO - Filed affidavit of John R. Bartels, A.U.S.A. in opposition to motion to reduce bail.
6-7-65	PATSY PIPARO - MEMO ENDORSED on motion filed 6-2-65, "Motion denied following argument of counsel. See minutes." (mailed notice) CANNELLA, J.
6-7-65	PATSY PIPARO - Filed Notice of substitution of atty. by James J. Hanrahan, 202 E. 110th. St. NYC. consented to. So ordered, Clerk.
6-7-65	CARMINE SAGLIMBENE) PATSY JOSEPH PIPARO) - Motions for bill of particulars submitted - Decision Reserved. CANNELLA, J.

Docket Entries

6-11-65	PATSY JOSEPH PIPARO - Filed Opinion No. 31,327 - Motion for bill partic. granted as to items consented to by Gov't; in all other respects requests are denied (See opinion) So ordered (Notice mailed 6-14-65) CANNELLA, J.
6-11-65	CARMINE SAGLIMBENE - Filed Opinion No. 31,328 - Motion for bill partic. granted as to items consented to by Gov't; in all other respects requests are denied (See opinion) So ordered. (Notice mailed 6-14-65) CANNELLA, J.
6-11-65	Filed opposing affdvt to motions for bill of particulars.
7-6-65	PATSY JOSEPH PIPARO - (atty present) - On oral motion of deft's counsel, bail is reduced to $15,000. Deft. Remanded in lieu of reduced bail. BRYAN, J.
7-15-65	PATSY JOSEPH PIPARO - Motion for reduction of bail - Denied. PALMIERI, J.
7-16-65	PATSY JOSEPH PIPARO - Filed Remand, dated 4/29/65. Palmieri, D.J.
7-22-65	Filed Bill of Particulars.

Docket Entries

7-29-65	PATSY JOSEPH PIPARO - On motion of defendants attorney, bail reduced to the sum of $10,000. Defendant remanded in lieu of reduced bail. TYLER, J.
7-29-65	PATSY JOSEPH PIPARO - Filed complaint and temp. commitment both dated 2/12/65
8-4-65	PATSY JOSEPH PIPARO - Filed Remand, dated 7/6/65. BRYAN, D.J.
8-25-65	PATSY JOSEPH PIPARO - Filed Remand, dated 7/29/65. TYLER, J. Memorandum endorsed: "Def't Released on Bail - 8/18/65 - E.N. Bishopp, U.S. Comm'r"
5-22-66	PATSY JOSEPH PIPARO: filed bailbond $10,000. dated 8/18/65 The Stuy. Ins. Co.
5-24-66	CARMINE SAGLIMBENE: Filed commissioners record of Proceed. bailbond $6500. PSMICo. dated 4/29/65.
8-31-66	PATSY JOSEPH PIPARO - Filed substitution by Sabbatino & Todarelli, Esqs., 233 Broadway, N.Y., 10007 - "So Ordered - 8/31/66 - John J. Olear, Jr., Clerk", Consent, dated 8/29/66 of James J. Hanrahan, Esq., to withdraw as attorney and Notice

	of Appearance by Sabbatino & Todarelli, Esqs., 233 Broadway, N.Y. 10007, as attorneys for the defendant.
10-25-66	PATSY J. PIPARO - Filed Affidavit and Notice of Motion to suppress evidence secured by wire tapping and electronic eavesdropping.
11-14-66	CARMINE SAGLIMBENE - Filed Affidavit and Notice of Motion for suppression and for inspection of grand jury minutes.
11-28-66	P. J. PIPARO: Filed memo. endorsed on motion to suppress. The "Motion denied without prejudice to a renewal before the trial Judge., So Ordered" . . . TYLER, J. . . . sent notice
11-29-66	P. J. PIPARO: Motion dated 11/14/66 to suppress etc. endorsed on motion. "This motion is respectfully referred to Judge Croake to whom this case has been assigned for trial. TYLER, J.
12-14-66	CARMINE SAGLIMBENE - 2nd Memorandum endorsed on motion, filed 11/14/66: "This case having been returned to the Criminal Calendar, this motion is respectfully returned to the Judge presiding at the call of the Criminal Calendar. 12/14/66 CROAKE, J." [these papers are in safe with this indictment]

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Docket Entries

12-14-66	BOTH DEFTS: Filed two affidavits of John R. Bartels, Esq., AUSA, each dated 11/28/66.
4-6-67	PATSY J. PIPARO (Atty present) CARMINE SAGLIMBENE (not present in Court) - HEARING - re: Motion to suppress. Government moves to sever Count 1 as to BOTH DEFENDANTS and to sever as to deft. SAGLIMBENE - GRANTED. Hearing proceeds as to defendant PIPARO only on Counts 2, 3, 4 and 5. Hearing Concluded. MOTION GRANTED. TENNEY, J.
4-7-67	PATSY JOSEPH PIPARO (atty present) Case called for trial (12:05 PM) Deft. not present in Court. Gov't's motion for issuance of bench warrant and for bail forfeiture granted. TENNEY, J.
4-7-67	PATSY JOSEPH PIPARO - Bench warrant issued.
7-25-67	Filed Transcript of record of proceedings, dated 4-7-67
1-3-68	P.J. PIPARO: - Filed warrant for arrest of defendant dated 4/7/67 - UNEXECUTED.

Docket Entries

11-19-70	Both Defts: - Closed statistically because (√) defendant (√) co-defendant (√) witness is a fugitive. In all other respects this case is still pending.
1-11-71	CARMINE SAGLIMBENE - B/W ordered. MacMAHON, J.
3-9-71	C. Saglimbene - surrendered to room 318. with his attorney - Warrant vacated. Deft. moves for a speedy trial. Granted. Set date for trial 3-29-71 10 A.M. Rm. 519. Bail continued. MacMahon, J. /concluded.
4-26-71	C. Saglimbene: Trial begun/ before MAC MAHON, J. with a jury Defendant's motion to dismiss counts 3, 4 and 5 - granted. Jury verdict - GUILTY on counts 1 and 2. Deft. has 10 days to make motions. P.S. Investigation ordered. Sentence adj'd for 3 weeks. MAC MAHON, J.
4-27-71	Bail increased to $25,000. pending the determination of motions. Deft. has until 12 noon on 4-27-71 to post bail. MAC MAHON, J.
5-24-71	Filed Envelope ordered sealed by MacMahon, J. and Placed in Vault in Clerk's Office rm. 602. MacMahon, J. /No. 71,554

Docket Entries

5-24-71	CARMINE SAGLIMBENE - Deft. waives his right to motions within 10 days, . . . Deft. moves for judgment of acquittal - DENIED. Filed Judgment (atty present) It is adjudged that the deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10 YEARS on each of counts 1 and 2 to run concurrently with each other - AND - Defendant is FINED $20,000. on each of counts 1 and 2. TOTAL FINE of $40,000. is to be paid or the deft. is to stand committed until the fine is paid or he is otherwise discharged according to law. Commitment and copies issued to US Marshal. MacMAHON, J.
5-24-71	CARMINE SAGLIMBENE - Filed notice of appeal to the U.S. Court of Appeals, $5.00.
6-17-71	Filed transcript of record of proceedings dated 3-29-71.
6-29-71	Filed Transcript of record of proceedings dated 5-24-71.
6-29-71	Filed transcript of record of proceedings dated 4-26-71.

Docket Entries

8-23-71	CARMINE SAGLIMBENE - Docketed Judgment of the U.S.C.A., filed 5/20/71, denying petition for a writ of mandamus, together with a motion for a stay.
11-17-71	CARMINE SAGLIMBENE - Docketed Judgment of the U.S.C.A., filed 11/11/71, affirming the judgment of the District Court. "Judgment entered 11/12/71 John Livingston, Clerk."

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1174

CARMINE SAGLIMBENE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner's principal claim here is that he was denied his right to a speedy trial.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy and one substantive count of a five-count indictment charging him and Patsy Piparo with the sale of a quantity of heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174.[1] On May 24, 1971, petitioner was sentenced to ten years' imprisonment on each count, the terms to run concurrently, and

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[1] Three of the substantive counts were dismissed with the government's consent on defendant's motion at the conclusion of the government's case. Piparo fled prior to trial and remains a fugitive.

fined $20,000 on each count. The court of appeals affirmed without opinion (*Saglimbene* v. *United States*, No. 71-847, Pet. App. A). On June 26, 1972, this Court vacated the judgment and remanded the case to the court of appeals (408 U.S. 916) for further consideration in light of *Barker* v. *Wingo*, 407 U.S. 514. On remand the court of appeals affirmed (Pet. App. 1a-5a), 471 F. 2d 16.

Petitioner claims that his constitutional right to speedy trial was violated because of the lapse of six years between indictment and trial. The particular facts in this case, upon which this contention is bottomed, were examined in the opinion of the court below, which carefully and correctly applied the controlling principles under *Barker* v. *Wingo*, 407 U.S. 514, in denying this claim. We rely on the opinion below in urging that the petition for a writ of certiorari be denied. Moreover there is no reason to defer action on the petition pending a decision in *Strunk* v. *United States*, No. 72-5521, certiorari granted, January 8, 1973. There the issue is whether a court may, under certain circumstances, reduce the length of defendant's sentence when the court finds that his right to a speedy trial has been violated, rather than dismiss the prosecution outright. As the court below pointed out, *Strunk* is inapposite because in the present case there was no violation of petitioner's right to a speedy trial. Since petitioner was not incarcerated prior to trial, there is likewise no basis for his claim that, here as in *Strunk*, the period of delay should be credited against the sentence imposed.

Petitioner's remaining contentions, which he incorporates by reference to his initial petition (No. 71-847),

are fully answered in the Memorandum in Opposition which was filed in response to that petition.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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[2] For the convenience of the Court, we are lodging ten additional copies of our initial Memorandum with the Clerk.